

<sup>2</sup> The Board notes that following the May 12, 2021 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

loss compensation benefits and Social Security Administration (SSA) age-related retirement benefits, without an appropriate offset; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$576.27 from appellant's continuing compensation payments every 28 days.

### **FACTUAL HISTORY**

On November 9, 2005 appellant, then a 61-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his neck, back, shoulder, and the right side of his leg when pulling postal container full of mail while in the performance of duty. OWCP accepted the claim for cervical sprain, lumbar sprain, hip sprain, and right knee sprain. It paid appellant wage-loss compensation for disability on the supplemental rolls effective December 25, 2005 and on the periodic rolls effective February 19, 2006.

On January 14, 2021 OWCP sent a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form to SSA for completion.

In a response dated February 18, 2021, SSA provided appellant's SSA age-related retirement benefits rates with FERS and without FERS from January 2010 through December 2020. SSA indicated that beginning January 2010, appellant's SSA rate with FERS was \$1,328.90 and without FERS was \$929.50; effective December 2010, his SSA rate with FERS was \$1,328.90 and without FERS was \$929.50; effective December 2011, his SSA rate with FERS was \$1,376.70 and without FERS was \$962.90; effective December 2012, his SSA rate with FERS was \$1,400.10 and without FERS was \$979.20; effective December 2013, his SSA rate with FERS was \$1,421.10 and without FERS was \$993.80; effective December 2014 and December 2015, his SSA rate with FERS was \$1,445.20 and without FERS was \$1,010.60; effective December 2016, his SSA rate with FERS was \$1,449.50 and without FERS was \$1,013.60; effective December 2017, his SSA rate with FERS was \$1,478.40 and without FERS was \$1,033.80; effective December 2018, his SSA rate with FERS was \$1,519.70 and without FERS was \$1,062.70; effective December 2019, his SSA rate with FERS was \$1,544.00 and without FERS was \$1,079.70; and effective December 2020, his SSA rate with FERS was \$1,564.00 and without FERS was \$1,093.70. SSA indicated that appellant received retirement payments beginning January 2010.

OWCP completed a FERS offset calculation form on March 18, 2021. It calculated the amount that it should have offset from appellant's wage-loss compensation for each period from January 1, 2010 through February 27, 2021. OWCP found that, from January 1, 2010 through November 30, 2010, appellant received an overpayment of \$4,397.79; from December 1, 2010 through November 30, 2011, he received an overpayment of \$4,805.97; from December 1, 2011 through November 30, 2012, he received an overpayment of \$4,992.88; from December 1, 2012 through November 30, 2013, he received an overpayment of \$5,064.68; from December 1, 2013 through November 30, 2014, he received an overpayment of \$5,141.69; from December 1, 2014 through November 30, 2015, he received an overpayment of \$5,229.53; from December 1, 2015 through November 30, 2016, he received an overpayment of \$5,243.85; from December 1, 2016 through November 30, 2017, he received an overpayment of \$5,245.17; from December 2017 through November 30, 2018, he received an overpayment of \$5,349.86; from December 2018 through November 30, 2019 he received an overpayment of \$5,499.07; from December 1, 2019

through November 30, 2020 he received an overpayment of \$5,602.21; and for the period December 1, 2020 through February 27, 2021, he received an overpayment of \$1,379.89. Based on these figures, OWCP calculated the total overpayment amount of \$57,952.58.

On March 19, 2021 OWCP informed appellant that it would begin deducting the portion of SSA age-related retirement benefits attributable to his federal service from his compensation benefits. It found that with the SSA offset he was entitled to net compensation every 28 days of \$2,406.80 effective February 28, 2021.

In a preliminary overpayment determination dated March 25, 2021, OWCP notified appellant of its preliminary finding that he had received an overpayment of compensation in the amount of \$57,952.58 because his wage-loss compensation benefits had not been reduced for the period January 1, 2010 through March 23, 2021 by the portion of his SSA age-related retirement benefits attributable to his federal service. It further advised him of its preliminary determination that he was without fault in the creation of the overpayment. OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable payment method and advised him that he could request waiver of recovery of the overpayment. It further requested that he submit supporting financial documentation, including copies of income tax returns, bank account statements, bills and canceled checks, pay slips, and any other records supporting income and expenses. Additionally, OWCP provided an overpayment action request form and notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

In an overpayment action request form dated April 20, 2021, appellant requested a decision based on the written evidence. He disagreed that an overpayment had occurred, the amount of overpayment, and further requested waiver of recovery as he was without fault in the creation of the overpayment. Appellant maintained that not all his SSA benefits were attributable to his federal service. In an OWCP-20 form of even date, he listed monthly income of \$8,257.00 and monthly expenses of \$5,476.91. Appellant indicated that he had assets in cash, checking accounts, and stocks and bonds of \$36,114.90. He provided supporting documentation. In an accompanying statement, appellant maintained that his wife was legally blind, and he also had eye problems and noted that the overpayment amount was in excess of their savings. He advised that soon his roof would need to be replaced and he would need a new automobile. Appellant contended that repaying the debt would be against equity and good conscience. He noted that he had not included his or his wife's annuity from deferred compensation/Thrift Savings Plans (TSP) that required minimum distributions as they were tax-qualified funds.

By decision dated May 12, 2021, OWCP finalized its preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$57,952.58 for the period January 1, 2010 through March 23, 2021 because it had failed to offset his compensation payments by the portion of his SSA age-related retirement benefits that were attributable to his federal service. It denied waiver of recovery of the overpayment as the evidence showed that he had sufficient income to repay the overpayment. OWCP noted that appellant's monthly income exceeded his monthly expenses by more than \$2,500.00. It required recovery of the overpayment by deducting \$576.27 from his continuing compensation payments every 28 days.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102(a) of FECA<sup>3</sup> provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty.<sup>4</sup> Section 8116 limits the right of an employee to receive compensation. While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.<sup>5</sup>

Section 10.421(d) of OWCP's implementing regulations requires OWCP to reduce the amount of compensation by the amount of any SSA age-related retirement benefits that are attributable to the employee's federal service.<sup>6</sup> FECA Bulletin No. 97-09 states that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP properly determined that appellant received an overpayment of wage-loss compensation in the amount of \$57,952.58, for which he was without fault, because he concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits without an appropriate offset. The Board finds, however, that the period of the overpayment was from January 1, 2010 through February 27, 2021, rather than the stated period in OWCP's decision of January 1, 2010 through March 23, 2021. OWCP began offsetting the portion of appellant's SSA age-related retirement benefits attributable to his federal service effective February 28, 2021. In reaching its calculation of the amount of overpayment, it correctly used the proper period of the overpayment of compensation, January 1, 2010 through February 27, 2021.

OWCP paid appellant wage-loss compensation for total disability beginning December 25, 2005. Appellant received SSA age-related retirement benefits beginning January 1, 2010. As noted, a claimant cannot receive concurrent FECA compensation for wage-loss and SSA age-related retirement benefits attributable to federal service.<sup>8</sup> The information provided by SSA indicated that a portion of appellant's SSA age-related retirement benefits were

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<sup>3</sup> *Supra* note 1.

<sup>4</sup> 5 U.S.C. § 8102.

<sup>5</sup> *Id.* at § 8116.

<sup>6</sup> 20 C.F.R. § 10.421(d); *see S.M.*, Docket No. 17-1802 (issued August 20, 2018).

<sup>7</sup> FECA Bulletin No. 97-09 (issued February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

<sup>8</sup> *Id.* *See F.K.*, Docket No. 20-1609 (issued June 24, 2021); *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

attributable to his federal service. Accordingly, the Board finds that fact of overpayment has been established.<sup>9</sup>

To determine the amount of the overpayment, the portion of SSA age-related retirement benefits attributable to federal service must be calculated. OWCP received documentation from SSA with respect to the specific amount of SSA age-related retirement benefits that were attributable to federal service. SSA provided the SSA rates with FERS and without FERS from January 2010 through December 2020. OWCP provided its calculations for each relevant period based on SSA's worksheet and determined that appellant received an overpayment of compensation in the amount of \$57,952.58 for the period January 1, 2010 through February 27, 2021. The Board has reviewed OWCP's calculation of dual benefits received by appellant for the period January 1, 2010 through February 27, 2021 and finds that an overpayment of compensation in the amount of \$57,952.58 was created.<sup>10</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129 of FECA<sup>11</sup> provides that an overpayment must be recovered unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience. Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. OWCP must exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.<sup>12</sup>

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his or her income (including compensation benefits) to meet current ordinary and necessary living expenses, and also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.<sup>13</sup> An individual's liquid assets include, but are not limited to, cash on hand, the value of stocks, bonds, savings accounts, mutual funds, and certificates of deposits. Nonliquid assets include, but are not limited to, the fair market value of an owner's equity in property such as a camper, boat, second home, furnishings/supplies,

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<sup>9</sup> See *L.K.*, Docket No. 20-1574 (issued June 23, 2021); *S.H.*, Docket No. 20-1157 (issued December 23, 2020).

<sup>10</sup> See *N.B.*, Docket No. 20-0727 (issued January 26, 2021); *L.L.*, Docket No. 18-1103 (issued March 5, 2019).

<sup>11</sup> *Supra* note 1.

<sup>12</sup> *G.L.*, Docket No. 19-0297 (issued October 23, 2019).

<sup>13</sup> 20 C.F.R. § 10.436. OWCP procedures provide that a claimant is deemed to need substantially all his or her current net income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. Its procedures further provide that assets must not exceed a resource base of \$6,200.00 for an individual or \$10,300.00 for an individual with a spouse or dependent plus \$1,200.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4a(2) and (3) (September 2020).

vehicle(s) above the two allowed per immediate family, retirement account balances (such as TSP or 401(k)), jewelry, and artwork.<sup>14</sup>

Section 10.437 provides that recovery of an overpayment is against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his/her position for the worse.<sup>15</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly denied waiver of recovery of the overpayment.

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.<sup>16</sup>

Appellant advised on an OWCP-20 form that he had monthly income of \$8,257.00 and monthly expenses of \$5,476.92. He further advised that he had assets in cash, checking accounts, and stocks and bonds of \$36,114.90, and an undisclosed amount as annuities in differed compensation/TSP. Appellant's stated assets exceed the resource base of \$10,300.00 for an individual with a spouse or one dependent, plus \$1,200.00 for each additional dependent, as provided in OWCP's procedures.<sup>17</sup> Because he has not met the second prong of the two-prong test, of whether recovery of the overpayment would defeat the purpose of FECA, it is not necessary to consider the first prong of the test, *i.e.*, whether he needs substantially all of his current income to meet ordinary and necessary living expenses.<sup>18</sup> Appellant has not established that he was entitled to waiver on the basis of defeating the purpose of FECA.<sup>19</sup>

Additionally, the evidence does not demonstrate that recovery of the overpayment would be against equity and good conscience. Appellant has not submitted evidence to substantiate that he would experience severe financial hardship in attempting to repay the debt, or that in reliance on such payment he gave up a valuable right or changed his position for the worse. Therefore, OWCP properly found that recovery of the overpayment would not defeat the purpose of FECA or be against equity and good conscience.<sup>20</sup>

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<sup>14</sup> *Id.* at Chapter 6.400.4b(3)(a), (b).

<sup>15</sup> 20 C.F.R. § 10.437(b)(1).

<sup>16</sup> *Id.* at § 10.436.

<sup>17</sup> *Supra* note 13.

<sup>18</sup> *See S.W.*, Docket No. 20-0363 (issued November 23, 2020); *M.H.*, Docket No. 19-1497 (issued September 9, 2020).

<sup>19</sup> *N.B.*, Docket No. 20-0727 (issued January 26, 2021); *R.D.*, Docket No. 19-1598 (issued April 17, 2020).

<sup>20</sup> *N.J.*, Docket No. 19-1170 (issued January 10, 2020); *V.T.*, Docket No. 18-0628 (issued October 25, 2018).

Because appellant has not established that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP properly denied waiver of recovery of the overpayment.<sup>21</sup>

### **LEGAL PRECEDENT -- ISSUE 3**

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.<sup>22</sup> Section 10.441 of OWCP's regulations provides that, when an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as the error is discovered or his or her attention is called to the same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship.<sup>23</sup>

### **ANALYSIS -- ISSUE 3**

The Board finds OWCP properly required recovery of the overpayment by deducting \$576.27 from appellant's continuing compensation payments every 28 days.

The record supports that, in requiring recovery of the overpayment by deducting \$576.27 from appellant's continuing compensation payments every 28 days, OWCP took into consideration the factors set forth in section 10.441 and found that this method of recovery would minimize any resulting hardship on appellant. OWCP followed minimum collection guidelines by requiring installments large enough to collect the full debt promptly. Therefore, the Board finds that OWCP properly required recovery of the overpayment by deducting \$576.27 from appellant's continuing compensation payments every 28 days.

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$57,952.58 for which he was without fault, because he concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits without an appropriate offset; however, the period of the overpayment is modified to reflect January 1, 2010 through February 27, 2021. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$576.27 from appellant's continuing compensation payments every 28 days.

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<sup>21</sup> See *T.C.*, Docket No. 21-0612 (issued December 2, 2021).

<sup>22</sup> *R.W.*, Docket No. 19-0451 (issued August 7, 2019); *C.A.*, Docket No. 18-1284 (issued April 15, 2019); *Albert Pinero*, 51 ECAB 310 (2000); *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

<sup>23</sup> 20 C.F.R. § 10.441(a); *M.A.*, Docket No. 21-0403 (issued December 17, 2021).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 12, 2021 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: May 5, 2022  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board